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ARTISTS' LEGAL INFORMATION SOCIETY

# LEGAL GUIDE for MUSICIANS

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Artists' Legal Information Society (ALIS) is a not-for-profit society which provides artists with legal resources and information. Our goal is to help all artists understand their legal problems and provide a framework for navigating obstacles.

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**LEGAL GUIDE FOR MUSICIANS**

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**This Guide is intended for legal information purposes only. If you need legal advice, please seek assistance from a lawyer.**

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# LEGAL GUIDE FOR MUSICIANS

MATTHEW GORMAN

## ACKNOWLEDGEMENTS

Music from Canada's east coast has inspired me my entire musical life, beginning with the amazing indie scene in Yarmouth, Nova Scotia more than 15 years ago. Since then, I am continuously blown away by the world-class talent that has and continues to come from the Atlantic Provinces. This *Guide* is dedicated to all the east coast musicians out there trying to make their mark, whether on the Atlantic Canadian, national, or international stage.

Thanks very much to Marty Glogier and the Artist Legal Information Society for the opportunity and forum to make this project a reality. Also, a big thanks to Chris Tucker for his amazing images and layout work. Several lawyers and musicians provided either feedback on sections of the *Legal Guide for Musicians* or practical information you don't get while sitting behind a desk, and I'd like to acknowledge them: Bob Tarantino, Stewart Hayne, Ben Caplan, Peter Lamey, Christian Hogan, John Mullane and Sean Farmer.

For all those in the music industry reading this *Guide*, I hope this information provides clarity on some issues and assists your career in some way.

**-Matt Gorman**

# PART I: COPYRIGHT IN THE MUSIC INDUSTRY

## 1. INTRODUCTION TO COPYRIGHT

Let's start with the basics: Copyright law can be described as a subgroup of a broader area of the law known as ***intellectual property***. Unlike real property (e.g. your house) and personal property (e.g. your lawn mower or car), intellectual property deals with intangible forms of property such as copyrights, trademarks, and patents. ***Copyrights*** refer to artistic and literary works, such as musical compositions and recorded music. ***Trademarks*** are designs, logos, sounds, or words used to distinguish products or services in the marketplace, which can include your band name (discussed further in Part IV). ***Patents*** refer to new and useful inventions (outside the scope of this *Legal Guide for Musicians*, but contact a lawyer or patent agent if you think you have invented the next million dollar idea or product).

Technically, copyright means the sole right to produce or reproduce (i.e. copy) your work or any substantial part thereof[1]. This right prevents others from copying a substantial part of your work without your consent. The holder(s) of copyright have, subject to some exceptions discussed below, exclusive control over a work. For songwriters, this means that you, the songwriter, have the right to control what happens with the song you just recorded at Echo Chamber[2] , Sonic Temple[3] , or on your Mac using GarageBand.

Although copyright protects creators by preventing others from copying a substantial part of a work (such as a piece of music), the purpose of copyright is to find a balance between (1) ensuring the creator obtains a just reward for their work and (2) promoting the sharing and distribution of art and music. In other words, although the rights of creators and authors need to be protected, the copyright system shouldn't be so rigid that you get sued for whistling a Beatles tune. Courts and lawmakers have been fine-tuning this balance for decades, which has been particularly challenging in the information age where copyright protected work is being created and shared online at lightning speed.

## 2. HOW DO I GET A COPYRIGHT?

If your work is 'original', 'fixed', and you are a Canadian citizen, the work will automatically attract copyright protection. You don't need to do anything else - it's that simple.

***Original*** means that the work is not copied from someone else and shows the exercise of skill and judgment.[4] This does not mean that the work needs to be particularly good or even creative.

***Fixation*** means that the work is fixed in some tangible form such as a recording or sheet music with lyrics. The need to 'fix' a work stems from the fact that copyright does not protect ideas, only the expression of ideas. Legend has it that Paul McCartney composed the melody for "Yesterday" in a dream back in the 60s. As awesome as that is, this iconic song would not have received copyright protection until it found its way from Paul's subconscious to a napkin or the recording studio.

Generally speaking, copyright lasts for the life of the author plus 50 years.[5] For sound recordings, the term of copyright has recently been extended to the *earlier* of (1) 70 years from publication (i.e. release to the public) of the song and (2) 100 years from recording[6]. For example, if you recorded your song in 2000, but waited until 2035 before publishing, copyright protection in the sound recording would accrue until 2100 (100 years from the recording date) not 2105 (70 years from publication). See

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[1] See section 3(1), *Copyright Act*, RSC 1985, c C-42

[2] Recording studio located in Halifax, Nova Scotia

[3] Ditto.

[4] *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13

[5] Technically, it is for the life of the author, the remainder of the calendar year in which the author dies, and 50 years following the end of the calendar year (see Section 6, *Copyright Act*, RSC 1985, c C-42).

[6] Ibid, Section 23(1.1)

Bob Tarantino's article for a much better explanation."

## 3. DO I NEED TO REGISTER MY COPYRIGHT?

It is unnecessary to register your song with the ***Canadian Intellectual Property Office***. As discussed above, once your song is fixed, assuming it meets the threshold of originality, you automatically have your copyright. Registering your copyright has some added benefits in an infringement case and is good evidence that your copyright exists (in case you have to prove it in court), but most artists do not register through CIPO. You can register your songs with SOCAN (discussed further in Part II, section 4) or even email a copy of the digital file to yourself, which also serves as good evidence of the date copyright subsists (albeit not as good as formal registration).

## 4. OWNERSHIP OF COPYRIGHT

Under copyright law, the ***author*** and the ***owner*** of the work are two different concepts, but the ***author of a work is the first owner*** of the copyright[7], subject to some exceptions discussed below. The author is the person who created the work, while the owner is the person who holds the economic rights in the work (the copyright holder). Since the author of a work is the first owner, the author and the owner will normally be the same person until copyright is assigned by written agreement[8]. For example, copyrights may be transferred from the author (e.g. the songwriter) to a music publisher, who is then tasked with commercializing the song (more on publishing in Part II). The songwriter continues to be the author of the work, but once the publishing deal is completed, the music publisher becomes the owner (or part owner) of the copyright in the musical composition.

There are two notable exceptions to the general rule that an author of a work is the first copyright owner:

> (1) For sound recordings, the ***maker*** of a sound recording owns the copyright in the sound recording.[9]Although there is not tons of guidance from the courts on what "maker" means under the law, it is defined as the person who makes the "arrangements" for the sound recording, which could include a label that books the studio time, contracts with the session musicians, and pays for the recording, for example. Musicians will be "makers" of their own record if they make the arrangements themselves (e.g. funding, booking studio time, etc.).
>
> (2) Where a work is made in the course of an artist's employment, the first owner of the copyright is the employer.[10] For example, if you signed a record deal that effectively makes you an employee of the record company, anything you write during the term of your employment would be owned by the label.

If there is more than one author (that is, if the song is co-written by two or more people), things can get a bit complicated. A ***joint owner*** needs to establish that they made some significant original expression/contribution to the work, keeping in mind that the contribution need not be equal to that of the other co-authors. One court case involving a dispute over Sarah McLachlan songs held that, in addition to significant expression, there needs to be an *intention* among co-authors of the joint authorship.[11] Although each case will be decided based on its unique set of facts, it is fair to say that minor suggestions like, "hey man, you should put a capo on the first fret of the guitar", probably won't attract co-authorship status.

For modern pop hits, it isn't unusual to see many registered authors of a song. For example, Justin Bieber is one of five songwriters listed for his hit "Sorry" (which is the subject of a lawsuit at the time of writing this *Legal Guide for Musicians* – see below for the juicy deets).

If you are thinking about co-authoring a song or if you regularly collaborate with other musicians or producers, retaining a lawyer to draft a Co-Author or Collaboration Agreement is highly recommended, which would confirm the co-authors, ownership of copyrights, potential revenue split, and any rights and restrictions that might apply. The music 'biz' was built on handshake deals, but confirming your rights in a written agreement is always recommended.

## 5. IF YOU ARE THE COPYRIGHT OWNER, WHAT RIGHTS DO YOU HAVE?

Copyright is sometimes referred to as a "bundle" of rights. That is, once you own a copyright, there are several rights that flow from this ownership. Generally speaking, we can break these rights into "economic rights" and "moral rights".

### *Economic Rights:*

***Economic rights*** are the rights you are going

[7] *Copyright Act*, RSC 1985, c C-42, section 13(1)
[8] As per section 13(4) of the *Copyright Act*, RSC 1985, c C-42, an assignment of copyright is not valid unless it is in writing and signed by the owner.
[9] Section 18(1), *Copyright Act*, RSC 1985, c C-42
[10] Section 13(3), *Copyright Act*, RSC 1985, c C-42
[11] *Neudorf v. Nettwerk Productions Ltd.*, 1999 CanLii 7014 (BC SC)

to hang your hat on when trying to make money. Some of these economic rights include the following:

(i) The sole right to produce or reproduce the work or any substantial part in any material form[12] - this includes recording it, making sheet music, featuring the song on a TV show or movie, or making a song available for download[13];

(ii) The sole right to perform the work or any substantial part in public[14] - this includes a live performance or playing the recording in public (these 'public performance rights' are assigned to SOCAN if you are a member);

(iii) The sole right to make a sound recording of the work which may be mechanically reproduced or performed[15] - this includes reproducing the work on CD, vinyl, cassette, and the right to approve the recording of a cover version of the work; and

(iv) The sole right to communicate the musical work to the public by telecommunication[16]- this includes broadcasting the work on television or radio or streaming the work online (these rights are also assigned to SOCAN if you are a member).

Furthermore, a performer has a copyright in their ***performance*** (i.e. live or recorded performance), which consists of, for example, the sole right to communicate the performance to the public and record it.[17] This means that a performer has the right to prevent others from recording their performance and broadcasting the performance without permission. More on live performances in Part V.

Any of these economic rights are the owner's to assign or license as they please.

*Moral Rights:*

***Moral rights*** comprise of two main rights: (i) the integrity right and (ii) the paternity right. The integrity right protects the honour or reputation of the author and ensures the author's work is not unlawfully "distorted, mutilated or otherwise modified."[18] The paternity right is the right to be named as an author of the work, to be named under a pseudonym, and the right to be anonymous. Moral rights can be waived by an author, but they cannot be assigned.[19] In other words, an author may assign their copyright in a musical work to a publisher, but the author always maintains their moral rights, which can only be waived by contract. Moral rights might become an issue if a publisher places your song in an advertisement for cigarettes or Cialis.

## 6. MUSICAL COMPOSITION COPYRIGHT VS. SOUND RECORDING COPYRIGHT

If you remember anything about this *Legal Guide for Musicians*, this should probably be it: Whenever you are dealing with a piece of recorded music, there are <u>two</u> distinct copyrights at play: (1) the ***musical work copyright***, which is the musical composition comprising of notes, instrumentation, melodies, etc. and (2) the ***sound recording copyright***, which is the master recording of the musical composition.

Subject to an assignment of copyright to a publisher or record label, the author/creator of the musical composition would generally retain copyright in the musical work copyright while the performer of the song on the record and/or producer would retain copyright in the sound recording. If you are the songwriter and performer on the record, you would be granted rights to both the musical work copyright and sound recording copyright.

The following example illustrates the difference between the two copyrights: if I'm making a film about the history of fireworks and think it would be appropriate to have Katy Perry's "Firework" play during the opening credits, I would need to secure a license for <u>both</u> the musical composition copyright (usually owned by the publisher) and the sound recording copyright for use of the master recording (usually owned by the record label). Once I find out that the cost to secure the master recording for "Firework" is my entire movie budget, I decide to pay my friend, Jim, $200 to record the "Firework" melody on his Korg organ. In that situation, I still need to secure rights for use of the musical composition copyright as I am still reproducing the song's melodic structure, but not the sound recording copyright as I am using Jim's version of "Firework", not Capital Records' version. Since the song is being paired with visual images, I may also need to secure a synchronization license, but more on that in Part II.

If you are serious about your music, you need to control the ownership of your musical composition copyrights and sound recording copyrights well before publishers and record labels come into the picture. If you play in a band or frequently collaborate with other musicians, for example, a written contract is a good way to establish who owns what with respect to the musical compositions (Band Agreements are discussed in Part IV). Furthermore, when working with the person/people involved in the recording process (e.g. producer or sound engineer), ensure you determine from the outset whether they will expect any share of the musical composition or

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[12] Section 3(1), *Copyright Act*, RSC 1985, c C-42

[13] *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada,* 2012 SCC

[14] Ibid, section 3(1)

[15] Ibid, section 3(1)(d)

[16] Ibid, section 3(1)(f)

[17] Section 15(1), *Copyright Act*, RSC 1985, c C-42

[18] Ibid, section 28.2(1)

[19] Ibid, section 14.1(2)

sound recording copyrights. Generally, the answer would be 'no' unless the producer and/or sound engineer have made a significant original contribution to the writing and creative process or are considered a 'maker' of the sound recording (see section 4, above).

## 7. WHAT'S THE DEAL WITH COVER SONGS?

As discussed, only the copyright owner has the right to reproduce, make a sound recording, perform, etc. their copyright protected material. Therefore, if someone wants to cover a song (i.e. reproduce it) they have to get permission to do so, which usually takes the form of a ***license***. A license is essentially permission to use copyright protected material based on terms set out in the license.[20] To reproduce a work on a physical medium such as vinyl, CD or tape, you would require what is called a ***mechanical license*** (more on that in Part II, Section 4). Assuming you secure the mechanical license with the rights holders (typically through the CMRRA – see Part II), anytime you sell a record with the cover song on it, you must pay the original songwriter (or the publisher, depending on who holds the musical copyright) 8.3 cents per copy manufactured where the playing time is 5 minutes or less. An additional 1.66 cents is added for each extra minute. The rate is a bit higher in the U.S. For the reproduction of musical works by online music services, see the CSI Music Canada website, which has a different royalty rate structure. If you are doing a video of the cover (like youTube), you also technically require a synchronization license (again, more on that in Part II). This is required when the song is paired with visual images. Presently, YouTube has a deal with certain songwriters/publishers of original material where the songwriter/publisher can either request that a video that incorporates copyright protected material (like a cover version of a song) be taken down or earn royalties off the cover through ads. See YouTube's take-down policy and Content ID program for more information. Strangely enough, many artists have achieved stardom through YouTube by posting covers, most of which were done illegally.

## 8. USERS' RIGHTS - EXCEPTIONS TO COPYRIGHT

As previously discussed, the goal of copyright law is to strike an appropriate balance between owners' rights (the artist or whoever they assigned their rights to) and users' rights (the music consumer). For that reason, the *Copyright Act* creates some exceptions to copyright and authorizes users to use copyright protected material that might otherwise constitute infringement. The following is a non-exclusive list:

- **Non-commercial user-generated content**[21] – This is sometimes referred to as the "mash-up" exception. This right allows a consumer to use copyright protected works to create a new work, so long as (i) the original author is identified, (ii) using the work does not have an adverse effect on the original work, and (iii) the new work is for non-commercial purposes. For example, this might include a fan video of me playing drums to a medley of my favorite Rush songs.

- **Reproduction for private purposes**[22]- This is sometimes referred to as the "format-shifting" exception. This right allows a consumer to reproduce copyright protected work for *private* purposes. For example, I could copy songs purchased from iTunes onto my iPod or other device.

- **Backup Copies**[23] – This right allows users to create "backup" copies, so the user is not infringing copyright by transferring a music library from a laptop to an external hard drive, even though such an act is technically a reproduction of the works.

- **Fair dealing**[24] – This right allows a user to reproduce copyright protected work if:

(a) it falls within one of the following categories (i) ***criticism or review*** (e.g. reproduce snippets of music and lyrics for an online record review), (ii) ***news reporting***, (iii) ***research*** (e.g. reproducing 30-second clips of songs in a record store for customers), (iv) ***private study and education*** (e.g. burning a copy of essential Neil Peart songs for my drum students), or (v) ***parody and satire*** (yes – Weird Al Yankovic falls within this category, but he obtains permission from songwriters before recording the parodies. Parodying more than a few lines/phrases is likely not excusable as fair dealing); and

(b) the dealing is "***fair***" based on factors such as (i) the amount of the dealing (for example, are you reproducing 4 seconds of the song or 4 minutes); (ii) the economic effects on the author (might apply to my Rush drum video if no one is buying Rush records anymore because they prefer listening to my Neil Peart collage), and (iii) the purpose of the dealing (for example, this factor may not be an issue if I give the track away for free but may be an issue if I am using the reproduction for commercial purposes).

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[20] For example, the license may dictate how long the song may be used, fees payable to the copyright owner, limitations on use of the song, how the license may be terminated, etc.

[21] Ibid, section 29.21

[22] Ibid, section 29.22

[23] Ibid, Section 29.24

[24] Ibid, Section 29

As you can see, lawmakers and courts have a difficult job when trying to balance the ***rights of authors*** to control and commercially exploit their work with the ***rights of users*** to access and share copyright protected work as freely as possible.

## 9. DERIVATIVE WORKS

The concept of '***derivative work***' is an American concept, but it gets talked about colloquially in Canada. A derivative work is a work that is based on one or more works that already exist. For example, if I take a previously composed piece of music and rearrange it, alter the melodic phrasing, and change the instrumentation, this new ***arrangement*** would be considered a derivative work. A movie adaptation of a book or a translation would also be considered derivative works.

In Canada, a derivative work, such as a rearranged piece of music, can attract copyright so long as it is original. The tricky question, of course, is whether the derivative work can meet the originality test when it is based on a pre-existing work! If a musical arranger developed and significantly altered the original composition of a piece by using great orchestral skill and judgement, courts have recognized that the new work could attract copyright protection in its own right, despite the fact that it is based on an existing composition.[25] Having said that, authors of derivative works should be careful as derivative works inherently require the reproduction of all or a substantial part of the underlying original work. As a result, any reproduction of that derivative work would constitute copyright infringement. In other words, don't think you can simply alter a hook from a popular song and make it your own without permission from the author or publisher.

## 10. SAMPLING

Sampling is the process of using a segment from a master recording or musical composition and placing it within another composition, which is generally very short in duration and likely looped throughout the new work. If you use a sample for non-commercial purposes, you might get away with it if the copying satisfies the requirements for non-commercial user-generated content (see section 8, above). All other sampling for commercial purposes is considered infringement if it is deemed to be substantial (further discussion on infringement in section 11, below). As of the writing of this *Legal Guide for Musicians*, a Canadian court has yet to consider the practice of music sampling[26], but we can always look to our neighbors to the south for guidance:

The Beastie Boys were sued for using a six-second, three-note flute sample in "Pass The Mic", which was held to be too short in duration to be considered infringement[27]. Note that at issue here was copying of the musical composition, not the sound recording. NWA was sued for using a two-second guitar sample from Funkadelic's "Get Off Your Ass And Jam" in "100 Miles And Runnin."[28] Use of the sample was found to be copyright infringement, even though it was pitch-shifted and virtually unrecognizable. Although the sample used in the Beastie Boys case was considered to be *de minimus* (under U.S. law meaning that the copying was so small that the court permits it), the court in the NWA case held that even using small segments of recorded music is not permitted, and that using anything less than the full recorded song could be infringement. In another case, the Verve's "Bitter Sweet Symphony" sampled an orchestral version of the Rolling Stones' "The Last Time". The Verve negotiated a license to use the orchestral sample, but apparently exceeded the portion they were entitled to use under contract. All royalties to the song were relinquished to ABKCO Records, and Mick Jagger and Keith Richards were given songwriting credits to the track. Ouch.

Given the uncertainty under Canadian law regarding the practice of music sampling, if you plan to use your recording for commercial purposes, the sample should be ***cleared*** before you use it. This includes obtaining a license that covers use of the musical composition, the sound recording, or both. Clearing samples could be a time-consuming process, so be prepared. To secure a license for the song you could try contacting the song's publisher, which you can find through the SOCAN, ASCAP, or BMI websites. The license for the sound recording is a bit more complicated as the record company usually holds the copyright. You can also try contacting the artist directly.

## 11. INFRINGEMENT OF COPYRIGHT: ENFORCING YOUR RIGHTS

It is an infringement of copyright for any person, without the consent of the owner of the copyright, to do anything that only the owner of the copyright has the right to do.[29] Section 5, above, discusses rights that only the owner of a work has, such as the sole right to produce or reproduce the work. This means, for example, that if you record a song that you've written, you have the sole right to reproduce and make copies of that work. If, 6 months after the release of your EP, you hear a song on the radio that closely resembles your tune, you may have an infringement claim.

In the music business there is a blurry line between copying and inspiration. If two songs

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[25] *Redwood Music Ltd. v. Chappell & Co.* [1981] 3 EIPR 91.

[26] *Musicians and the Law in Canada*, Sanderson, Paul 4th ED, 2014 (page 132)

[27] *Newton v. Diamond*, 388 F. 3d 1189 (9th Cir. 2004)

[28] *Bridgeport Music, Inc. v. Dimension Films*, 410 F. 3d 792 (6th Cir. 2005)

appear to sound alike on the surface, it doesn't mean that one artist copied the other. Some songs have similarities based purely on coincidence, subconscious inspiration, or generic musical patterns. Artists, publishers, and record labels have been fighting for decades over this "blurred line" (pun intended) between inspiration and outright theft of a verse, chorus, or unique chord progression. Let's look at a few examples:

- Marvin Gaye's estate was awarded approximately $7.4 million after a court determined that Robin Thicke's and Pharrell Williams' "Blurred Lines" copied Gaye's "Got to Give it Up."

- Sam Smith's "Stay with Me" was under scrutiny when similarities were discovered between Smith's song and Tom Petty's "I won't Back Down." The dispute was settled by giving Petty and co-writer Jeff Lynne writing credit for "Stay with Me" and 12.5% royalties from the song, which generated significant revenue in 2014.

- Led Zeppelin was accused of stealing Spirit's 1968 instrumental track "Taurus" to write the iconic "Stairway to Heaven", which was dismissed by a Los Angeles federal jury (in other words, Zeppelin was not found to have plagiarized Spirit).

- As of the writing of this *Legal Guide for Musicians*, a claim was filed against Justin Bieber by Casey Dienel (aka White Hinterland) in relation to the Biebs' 2015 hit (and ironically titled) "Sorry". Dienel is claiming that the Biebs and co-producer Skrillex ripped off the female vocal riff from her 2014 track "Ring the Bell."

The list goes on…

How does the law draw a distinction between inspiration and infringement? In order to prove infringement under Canadian law, you need to establish two things:

(1) The infringer had ***access*** to the infringing work and;

(2) The infringer's work is ***substantially similar*** to the original.

With respect to access, the plaintiff (i.e. you – the person who feels ripped off) would need to establish that the infringer had "access" or could reasonably be presumed to have had access to your song. In other words, it must be proven that the infringer either knew your song existed (such as establishing he/she purchased a record containing the copied song) or should have known it existed (for example, if the single that was copied went viral online and the infringer doesn't live under a rock). If the alleged infringer never had direct access to the original work, nor could reasonably be presumed to have had access, there is no infringement.

If access is established, the next step is determining whether the copied track is "substantially similar" to the original. With respect to substantial similarity, the plaintiff would need to establish that the copying was "substantial", which is fact dependent. Although there is not a great deal of certainty with respect to what will and will not constitute "substantial", we know that courts will generally look at the quality of the copying rather than the quantity. This means that copying an iconic riff like the intro to Stairway might be deemed substantial even if only a small portion is taken. Casey Dienel is obviously taking her chances by claiming that a 4-note vocal loop is capable of constituting infringement. Other factors that might be relevant in an infringement case include whether the taking was intentional and whether the infringer's use adversely affects the copyright owner.[30] At trial, it is often necessary to have expert "musicologists" testify as to the similarities of the songs, both from a quantitative and qualitative standpoint. One song could resemble another due to commonly used chord progressions and patterns, but it doesn't always mean there is copying. The Led Zeppelin and Taurus case is a good example of that.

Damages for copyright infringement when the use is for non-commercial purposes (for example, posting a Beach Boys cover song on Bandcamp for free) have been reduced to a maximum of $5,000. Infringement for commercial purposes can range from $500 to $20,000.

If you are concerned that your work is being unlawfully used without your consent, contact a lawyer. At least initially, the lawyer may draft a letter to the alleged infringer setting out the reasons for the letter and demand that the other artist and/or publisher stop using your work.

A relatively new development in Canadian copyright law is the ***notice-and-notice*** regime. In short, if a copyright owner (such as the owner of a musical work) sees evidence of infringement online (such as an illegal download), the copyright owner can send notice of such infringement to the internet service provider (ISP) or website host, known as 'internet intermediary'. Upon receipt, the intermediary is then required to forward the infringement notice to the user (identified by their IP address) who is alleged to have committed the infringement. The internet intermediary must confirm with the copyright owner once the notice has been sent to the alleged infringer. The notice sent from the copyright owner to the intermediary must identify the owner's name, address, material the owner believes is being

[29] Section 27(1), *Copyright Act*, RSC 1985, c C-42

[30] *Musicians and the Law in Canada*, Sanderson, Paul 4th ED, 2014 (page 131)

copied, and a summary of the owner's claim to that copyright protected material (such as a song).

Although notice and notice is certainly not a bad thing for copyright owners (such as owners of musical works), the internet intermediary is not required to do anything more than forward along the infringement notice to the unidentified alleged infringer. Once the infringer receives the notice, they may say, 'oh crap…they are onto me. I'm gonna take that down before I get sued!' The alleged infringer may also say, 'pfftt. Go pound sand.' If the latter, the copyright owner has no choice but to either let it go or proceed down the expensive route of going to court to (1) obtain an order for the intermediary to disclose the alleged infringer's identity; and (2) pursue legal action against them. For an interesting viewpoint on the notice-and-notice regime, see this Michael Geist article.

# PART II: PUBLISHING YOUR MUSIC

## 1. INTRODUCTION TO MUSIC PUBLISHING

There are a lot of musicians out there who love playing music for the sake of playing, and I consider myself one of them. However, if you are serious about playing music for a living, sooner or later you need to figure out how to tap into the various revenue streams available in the music biz. ***Music publishing*** continues to be a vital source of income for professional musicians, which is essentially the business of causing *musical work copyrights* to earn money.

The first thing to note is that earning royalties from publishing is different than earning royalties from record sales (discussed in Part III). Generally, the performer on the record would receive royalties from record sales whereas the songwriter would receive royalties from music publishing. This is because, as noted in Part I, section 6 of this *Legal Guide for Musicians*, the copyright in the record and the copyright in the musical work are two different things. For example, Bob Dylan wrote and recorded "All Along the Watchtower" in 1967. Bob Dylan would have received record royalties as the performer on the record and publishing royalties as the author of the musical composition. Six months later, Jimi Hendrix recorded a pretty decent cover of "All Along the Watchtower" on *Electric Ladyland*. Although Jimi would have received record royalties as the performer on the record, he would not have received publishing royalties. Bob Dylan would have continued to rack up publishing royalties as the author of the musical composition.

As previously discussed, the author and the owner of copyrights are two different concepts. Generally, most artists are both author and owner of their musical work copyrights at the early stages of their career. Music publishing is where ownership of the musical work copyright may be partially or entirely assigned to a music publisher, who is responsible for the commercialization and administration of the musical work copyrights. For example, suppose I play in a band called 'Isolated'. After recording our first record, Warner/Chappell's A&R department miraculously scouts out our band and offers us a publishing deal. In exchange for assigning the band's musical work copyrights to the company, Warner/Chappell will hit the pavement and ensure our songs are played on national radio, featured on Spotify and Apple Music, covered by other artists, played on TV and in films, featured in the coolest video games, etc. Aside from commercializing Isolated's songs, Warner/Chappell will also ***administer*** the musical work copyrights by attending to registration of the copyrights and collecting and distributing royalties.

Of course, in this example, Warner/Chappell will take a cut of the royalties earned as payment for their publishing services. This scenario is in contrast to artists who act as their own music publisher and keep 100% of their musical work copyrights. Although artists who act as their own publisher do not receive services from a specialized company, they do, however, (1) control their musical work copyrights and (2) receive 100% of any earned publishing revenue. If you decide to sign a publishing contract, like any other contract in the music biz, always ensure you retain experienced legal counsel to review the contract (see section 3, below, for information on specific contract terms).

## 2. THE VARIOUS TYPES OF PUBLISHING CONTRACTS

There are various types of publishing contracts that artists should be aware of. Keep in mind that the terms of the contract will dictate whether the publisher's right to administer (and share in the profit) is associated with a single song or group of songs during a term. In other words, a songwriter could give a publisher the right to earn revenue on and administer one single, or a collection of the songwriter's songs (including songs not yet written!). The following are the main types of publishing contracts seen in the music biz:

### *(i) Full Publishing Agreement*

Publishing revenue associated with every song is split 50/50 between the ***publisher's share*** and the ***writer's share***. With a full pub-

lishing agreement, 100% of the publisher's share goes to the publisher and 100% of the writer's share goes to the writer, amounting to a 50/50 revenue split between the songwriter and the publisher. If you imagine a revenue pie, half of the pie goes to the publisher and the other half goes to the songwriter. These types of agreements are not as common as they used to be.

### *(ii) Co-Publishing Agreement*

This is the industry norm nowadays. In order to wrap your head around co-publishing agreements, in addition to understanding the concepts of the publisher's share versus the writer's share of publishing revenue, you also need to understand the concept of ***active publisher*** versus ***nominal publisher***.

After a standard "Co-Pub" deal is signed, and once revenue starts pouring in, the songwriter takes 100% of the writer's share and the publishing revenue is typically split 50/50 between the active publisher (the corporate publisher the songwriter signed the contract with) and the nominal publisher (the songwriter's publishing company set up for the purposes of receiving money). If you think of the revenue pie as discussed above, and similar to the full publishing deal, half of the pie goes to the songwriter, which represents the writer's share. Under a co-pub arrangement, however, the other half of the pie, which represents the publisher's share, gets split between the songwriter's nominal publishing company and the active publisher doing all the work. Practically, the end result is that 75% of all net revenue goes to the songwriter and 25% goes to the active publisher. From a revenue splitting standpoint, the co-publishing split (75%) is obviously more favorable for the artist than the full publishing split (50%).

Under a full or co-publishing deal, all or a portion of the copyrights in the musical compositions will generally be assigned to the active publisher.

### *(iii) Administration Agreement*

An administration agreement is different from full and co-publishing in that the songwriter does not transfer any portion of its copyrights to the administrative publisher. In this case the administrative publisher's role is limited to collecting money on behalf of the artist and issuing licenses to third parties. The term of the agreement is generally shorter than the other agreements, and the administrative fee is generally 5% - 15% of the total income generated by a song.[31] If you've had a popular song for several years but have only seen minimal publishing revenue, an admin deal might be smart.

### *(iv) Sub-Publishing Agreement*

Assuming your publisher has the right to do so under contract, if your publisher grants rights to another publisher in a foreign jurisdiction, this would be called ***sub-publishing***. For example, my band may have an excellent Canadian publisher, but that publisher may not know anything about publishing our songs in Germany or the U.K. For that reason, it might be more efficient (and lucrative) to 'sub-publish' administration rights to a German or U.K. publisher, whose office would likely be much more familiar with the local performing/mechanical rights societies, industry players, how to maximize profit, etc.

Although publishing agreements may often be presented as "standard form", keep in mind that in the legal world there is rarely ever a "one-size-fits-all" contract. For that reason, always ensure you retain experienced legal counsel to review any contract before signing, including publishing agreements.

## 3. PUBLISHING CONTRACT TERMS

Contract terms can vary dramatically from contract to contract. Although there is no substitute to retaining experienced counsel to review your publishing contract in detail, this section will give you a general overview of some contract provisions you may see in a standard publishing contract. The contract may:

- Assign all or a portion of the musical work copyrights to the publisher so the publisher can deal with and administer the copyright. This also allows the publisher to sue another party for infringing your copyright.

- Identify the territory covered in the agreement, which is generally the "world". Keep in mind that not all publishers in Canada will have contacts in other parts of the world. If they don't, it might be wise to restrict the publisher's territory to Canada, allowing you to sign another deal with a publisher in the U.S. or Europe, for example.

- Set out the 'advance' or 'draw' payable to the songwriter. An advance is a cheque or possibly a monthly amount paid to the songwriter by the publisher after signing the contract. Typically, the advance is "non-returnable but recoupable", meaning if no money is made from the songwriter's songs, the songwriter does not have to pay back the advance to the publisher. However, as money starts rolling in, royalties go towards paying back the advance before going into your pockets. Any advance should be thought of as a loan.

- Set out how often you are going to get paid and allow you to

[31] *Musicians and the Law in Canada*, Sanderson, Paul 4th ED, 2014 (page 90)

audit the publisher every so often to ensure they are not short-changing you.

• Determine whether the relationship between artist and publisher is one of employee/employer, or whether the artist is an independent contractor. This is important because if the artist is deemed to be an employee rather than independent contractor, the first owner of any copyright created under the contract is likely the publisher, not the artist (refer to Part I, section 4).

• Determine whether the contract can be assigned and by who. Generally, the artist will not be permitted to assign the publishing contract without consent, but the publisher can. If the publisher is able to assign the contract, ensure they are limited to assigning only to a reputable publisher or one associated/affiliated with the current publisher. You could attempt to work in a right to consult with the publisher prior to any assignment of the contract.

• Set out the term of the contract (i.e. how long will the contract last). The contract may be a "tied deal" with a recording contract, which means that the term of the publishing contract is "co-terminous" with the record contract.

• Determine whether the publisher has the right to authorize altering your music or lyrics. If the publisher is given the right to do this, the songwriter should have the right to approve *material* changes. The right to alter should also not infringe moral rights (see Part 1, section 5).

• Restrict the publisher from using a song/collection of songs for certain uses, such as commercials for alcohol and tobacco. For obvious reasons, you may not necessarily want your song to be associated with those products.

• Dictate certain milestones that must be met by both publisher and the songwriter, failing which, the contract ends and copyrights revert back to the songwriter. The publisher, for example, may be required, by a certain date, to secure a recording contract for the artist, placements on T.V., movies and commercials, etc. For the songwriter, they will likely be required to produce a certain number of songs that don't suck (i.e. are 'commercially viable').

This is a very high-level summary of some of the contract terms you may see in a publishing agreement. The terms of any publishing contract will vary depending on the type of publishing deal, the publisher involved, and the bargaining power of the songwriter. Again, always ensure you get an experienced lawyer to review before you sign anything!

## 4. REVENUE STREAMS FROM MUSIC PUBLISHING

If you are planning to take music seriously, understanding how money ends up in your pockets as a songwriter is crucial. An experienced entertainment lawyer or business manager can certainly help you understand the various forms of revenue streams, but having a basic understanding empowers you as an artist. What follows is a high level overview of the basics.

### *(i) Public Performance Royalties*

One of your economic rights as copyright owner is the sole right to perform your work in public and the sole right to communicate the musical work to the public by telecommunication. Because public performance rights belong to the copyright owner, no one has the right to publicly perform your songs on radio, television, the internet (streaming services[32] and YouTube[33], for example), dance clubs, live at a bar or concert hall[34], Chinese food restaurants (you get the picture), without your permission. Purchasing a record gives you the right to play that record privately (non-commercially). It does not, however, give you the right to play that record to the public at large. Such "performance" of the song either requires a license from the songwriter/publisher or from SOCAN if the songwriter has already assigned their public performance rights to SOCAN.

SOCAN is a not-for-profit organization that administers the public performance rights of its member songwriters, composers, and music publishers. Technically, if you wanted to publicly perform a song, you would need to get a license from all songwriters, lyrists, and publishers of the music, which could be a daunting task. Alternatively, a SOCAN license would allow you to legally play that music in public. Fees that are paid for SOCAN licenses by restaurant owners, radio broadcasters, bar owners, dental offices, etc. are collected by SOCAN and then distributed to songwriters and publishers as fairly as possible. See the SOCAN website for more info.

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[32] SOCAN reported that copyright revenues from Internet streaming in 2015 hit $21.3 million, a 525% increase over the $3.4 million generated in 2013.

[33] SOCAN and YouTube reached an agreement for the payment of performing rights fees to SOCAN covering the period 2007 - 2015. An agreement for 2016 is currently being negotiated.

[34] A songwriter should be paid royalties for the live performance of its songs if the venue/promotor is licensed by SOCAN and a minimum of $6.00 is charged as cover to the show. Songwriters have up to 1 year to submit a Notification of Live Music Performance to SOCAN to claim their live performance royalties.

Let's say that I, "MC Gorman", wrote and recorded my first record *Mic Check, 1 2 3*. Before releasing the record, I register my songs with SOCAN and assign all public performance rights in the songs. After my CD release party at Gus' Pub, my single, "Lemon Squeezy", starts getting modest play on CBC Radio 3. Several months later I receive a direct deposit in my bank account from SOCAN for $0.50. Just when I'm about to throw in the towel, I notice that my single starts getting a lot of attention. The song is getting regular play on national radio, it received one million YouTube plays, it's blowing up on Spotify/Apple Music, and it becomes the opening jingle on "Degrassi: The Next (Next) Generation". Given the wide-scale public performances of my music, I begin to see my quarterly SOCAN direct deposits significantly increase.

Keep in mind that public performance rights are triggered by online performances, including on-demand streaming services like YouTube and Spotify, but not for digital downloads.[35] SOCAN has the right to seek license fees from any internet service that communicates a musical work in the territory of Canada. Given the vast amount of online content being processed, you may only begin to see SOCAN internet royalties for works which receive 500 or more 'performances'.

### *(ii) Mechanical Licensing*

A mechanical license gives the license holder the right to reproduce the musical work in a mechanical form. For example, if I want to reproduce a song by recording a cover version either physically (CD and/or vinyl) or digitally (available for digital downloads and streams), I would need a mechanical license from the owner(s) of the musical work copyright. Record companies and indie labels would need to do the same when they manufacture and distribute records since the musical work is being reproduced in this case as well. The current mechanical royalty rate payable to the owner of the musical work being reproduced is 8.3 cents per song if the song is less than 5 minutes, plus 1.66 cents for every minute beyond 5 minutes.[36] There is a separate royalty rate for musical reproductions online. See the CSI Music Services website for further information.

Similar to obtaining a performing rights license, obtaining a mechanical license from all of the necessary rights holder(s) could be a daunting task. For that reason, the one-stop shop for obtaining a mechanical license is the Canadian Musical Reproduction Rights Agency (CMRRA)[37] and the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC)[38], which are tasked with issuing and administering reproduction rights licenses on behalf of its member publishers. Note that it is not compulsory to sign up with either CMRRA or SODRAC, and that some publishers elect to administer their mechanicals on their own.

### *(iii) Synchronization Licensing*

A synchronization license (often called "synch" license) is needed to synchronize a musical work with visual images in film, T.V. shows, commercials, websites, YouTube videos, etc. If a producer of a T.V. show or film wanted to use a particular song for their project, they would need to obtain a synch license from the owner of the musical work. There is no set fee to obtain a sync license (unlike the mechanical license rate), so it will largely depend on the artist's bargaining power. An unsigned artist may be willing to sign a synch license for a few hundred dollars; however, Arcade Fire's or Father John Misty's publisher would likely be looking for the big bucks depending on the project.

Keep in mind that when syncing the musical work to visual images (like in a movie or T.V. show) a master use license (see Part III) will also be required if the master recording is being used. Again, always remember that the musical work copyright is different than the sound recording copyright. If the master recording is being used, a master use license will be required from the owner of the sound recording copyright (usually the record label). The particular song that a film/T.V. producer wants to use could be re-recorded, avoiding the need to obtain a master use license. However, the producer would still need to obtain a synch license as the musical work itself is still being used in synchronicity with visual images.

### *(iv) Digital music sales*

Songwriters should get paid for various forms of digital music sales, such as digital downloads, on-demand streaming, and non-interactive webcasting (see Part III, section 6 for further info). Since digital down-

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[35] *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada* 2012 SCC 35

[36] Sanderson 49

[37] CMRRA represents some 5000 music publishers and assists users in obtaining licenses for the reproduction of musical works and administers royalties to the owners of those musical works. Keep in mind that SOCAN issues licenses and administers the *public performance* rights of artists (i.e. songs played on the radio, TV, live performances, restaurants, etc.) whereas CMRRA issues licenses and administers the *reproduction* rights of publishers (i.e. physical reproduction of songs on vinyl, cassettes, or CDs or the recording a cover song for your upcoming record).

[38] SODRAC is an author's society that, like CMRRA, licenses the reproduction right in musical works to users and is primarily used in Quebec. The main differences are (i) reproduction rights are assigned to SODRAC but not CMRRA; (ii) SODRAC issues sync licenses (see below) but CMRRA does not; and (3) CMRRA acts in an agency role for its artists/publishers, but SODRAC does not. You can visit both the CMRRA and SODRAC websites to get more details on what kind of licenses they issue and the royalties payable for each license

[39] *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada* 2012 SCC 35

[39] Sanderson 49

loads, such as iTunes Store or Amazon, are treated the same as traditional CD sales, the artist would receive the appropriate mechanical royalty rate (see *Mechanical Licensing*, above). A digital download is not, however, considered a "performance", so no SOCAN fees are payable.[39] SOCAN performance royalties do come into play, however, with non-interactive streaming such as Pandora and on-demand streaming, such as Spotify and Apple Music. SOCAN has even reached an agreement with YouTube for the payment of performing rights fees to SOCAN covering the period 2007 – 2015, which will ensure SOCAN members receive public performance royalties from YouTube hits in addition to plays via digital streaming services.

*(v) Miscellaneous Revenue*

Other sources of publishing revenue might include sales from sheet-music, placing songs in video games, toys or other commercial products, ringtone sales, etc. Lastly, publishers may be able to bring in revenue from the "black tape levy", which compensates artists for the private (and unauthorized) reproduction of their music on CDs, digital media, cassette tapes, etc. For example, when you buy a package of blank CDs, a portion of the price is collected by the Canadian Private Copying Collective and ultimately distributed to rights holders.

## 5. SHOULD I SIGN A PUBLISHING DEAL?

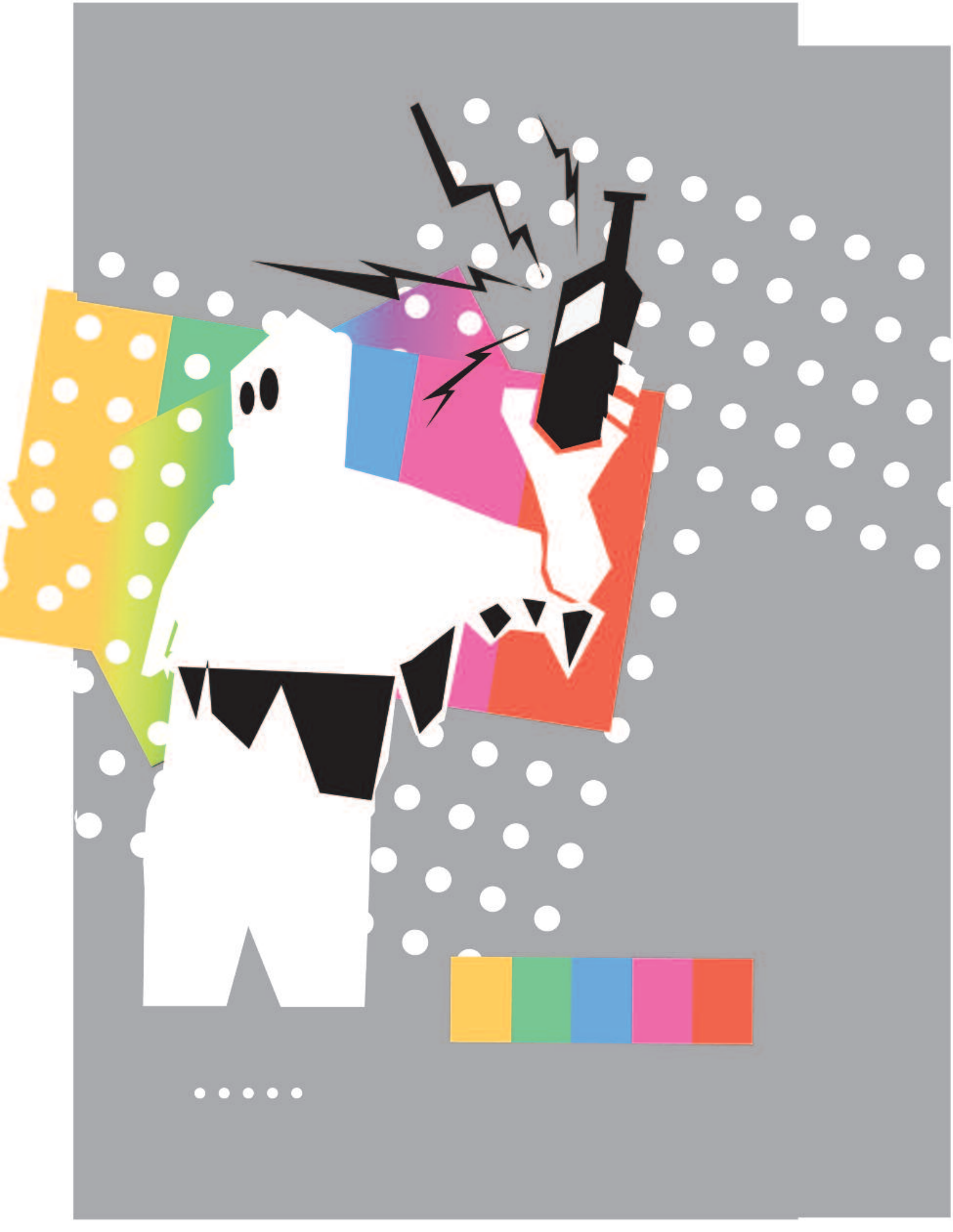
For some artists, the prospect of signing a publishing deal may be viewed as validation that they've 'made it' in the music business and will increases their chances of earning serious cash. No doubt, some publishers have a lot to offer for the songwriter's career. For example, the publisher may:

- Give you a juicy advance so you can quit your day job for good and work exclusively on your writing;
- Give you a budget to record demos;
- Shop your demos around to various labels and pitch/plug your songs to hot-shot T.V. and film producers;
- Assist you with developing your music creatively; and/or
- Help you network by inviting you to the coolest parties in Halifax, Toronto or Vancouver to meet the industry players.

Having said that, signing a publishing deal isn't always going to be sunshine and rainbows. Some things to note:

- The advance payable from a publisher is less of a signing bonus and more of a loan. As noted earlier, the advance will almost always be recoupable against future royalties. This means that, as money starts coming in from publishing revenue, it goes to the publisher until they are paid in full for the advance. What is given with one hand is taken away by the other. The same concept is likely applied when cash is given to you for recording a demo, for example.
- Depending on the terms in the contract, the recordings that the publisher paid for may belong to the publisher. This means you will not earn revenue from the commercialization of the master recording. A master use license is required, for example, if the master recording is being used in T.V., film, commercials, etc. This could be the loss of significant revenue for the artist (more on recording/masters in Part III).
- Publishers, especially the majors, are comprised of busy people who are far outnumbered by their songwriting clients. This means that the person making the pitch on your behalf has hundreds (if not thousands) of songs to consider aside from yours. The same is true when it comes to developing the artist creatively. At some points during your contract you may feel like you are the priority, but not always.
- All or a portion of your musical work copyrights are given up to the publisher, unless you are signing an admin deal (see section 2, above). Furthermore, and depending on the terns of the contract, copyright ownership and payment of royalties to the publisher could last for the remainder of your natural life (remember, copyright lasts for the life of the author plus 50 years).

The above discussion is not meant to sway songwriters one way or the other on the merits of signing a publishing deal, but is meant to empower songwriters with the information required to make an informed decision. Publishing contracts can certainly be a game-changer for an artist's career. Assigning a portion of your copyrights and splitting a huge revenue stream with a publisher is probably better than fully owning copyrights that aren't making you any money. On the other hand, if you are a motivated songwriter, are a master networker, and have the cash flow to finance your creative development and recording, then maybe hitting the pavement as your own publisher is right for you. Online platforms such as Facebook, Twitter, Instagram, YouTube and Bandcamp make it easier for artists to network and share their music to the masses instantaneously. A good publisher, however, will assist with cutting through the digital noise and the mountainous musical content floating out in the interwebs.



# PART III: RECORDING

## 1. INTRODUCTION

There's no doubt about it – the music business has and continues to evolve. In particular, the rise of digital downloads and on-demand steaming has changed the musical landscape and the way in which people listen to music. Although there is more music than ever before, people are not buying as many records as they once did. This paradigm shift continues to fundamentally change the nature and business of record labels, which traditionally sought to commercialize recorded music by selling as many records as possible.

In Part I, section 6 of this *Legal Guide for Musicians*, the difference between copyright in the musical work is distinguished from the copyright in the sound recording. Part II discusses the exploitation of the musical work copyright through publishing and the various available revenue streams. This section focuses on record labels and the commercialization of the **copyright in the master recording**.

## 2. ROLE OF THE RECORD LABEL

Generally speaking, record labels assist artists with producing master recordings, manufacturing and distributing records (vinyl, CD or other recorded medium), artist development, tour support and artist promotion. Smaller indie labels may perform some but not necessarily all of these functions.

## 3. ROLE OF THE PRODUCER

As previously discussed in Part I, section 4, the ***maker*** of a sound recording owns the copyright in the sound recording. The "maker" is defined as the person who makes the "arrangements" for the sound recording, which could include a **producer** or label that books the studio time, organizes the session musicians, and finances the recording, for example. It's very important that if you or your label engages the services of a producer, their role is clearly laid out in an agreement.

Not every artist is going to use a producer, but more serious artists may. The producer's role is to manage all aspects of the production of a master recording. The producer may be hired by musicians directly, or hired by the artist's label. Their services may include (i) booking a sound engineer and recording sessions at a studio; (ii) assisting artists/bands with musical arrangements, writing, harmonies, etc.; (iii) assist the artist with managing costs of the recording; (iv) assist with the selection of songs/content to be recorded; (v) supervise recording sessions, including the mixing and mastering stages of the recording process; etc. The producer's payment can vary, but it is likely a lump-sum payment, recoupable against future royalties, with a 1-3% commission of the retail list price of records sold.[40]

## 4. 360 RECORD DEALS

***360 record deals*** (also called multi-rights deals) can take a number of shapes, sizes and permutations. Generally speaking, 360 deals are deals where the label, in addition to royalties from record sales, takes royalties from non-record revenue streams such as live performances, merchandise, and publishing. The justification for labels tapping into these additional revenue streams is that the label will function as a pseudo-manager and look after the artist's entire career and development rather than only focusing on selling records, which was the case with traditional record deals in the past. Although these kinds of deals have been around for years in the indie world, the majority of major labels are only now adopting this as standard practice. The move towards 360 record deals is a natural shift for record labels that are badly bruised from declining record sales over the years.

Before signing a 360 deal, it is important that you retain an experienced entertainment lawyer to review the contract and provide advice on the pros and cons. What follows are some considerations to keep in mind:

- **Labels thinking long-term** – Since 360 deals allow labels to tap into revenue streams like touring and publishing, the label may not be as focused on recouping their

[40] See, generally, *Musicians and the Law in Canada*, Sanderson, Paul 4th ED, 2014 (page 342)

investment from record sales. Some may say this allows the label to commit to the artist long-term and focus on their continued development, rather than telling the artist to take-a-hike if their record doesn't sell 100,000 units or digital equivalents. Does the contract reflect this increased commitment by the label?

• **Advance** – Similar to publishing contracts, discussed in Part II, the 360 contract may set out the 'advance' or 'draw' payable to the artist. Again, this is a cheque or possibly a monthly amount paid to the artist after signing the contract. Like publishing contracts, these advances are "non-returnable but recoupable", meaning if no money is made from the artists' musical career, the artist does not have to pay back the advance to the label. Conversely, as money starts rolling in, royalties from revenue get applied to paying back the advance before going into the artist's pocket. Any advance should be thought of as a loan and not free money.

• **Copyright ownership in masters** – Standard recording contracts would typically have the artist assign to the label all copyright in any masters recorded during the term of the contract. Since labels are recouping their investment at a faster pace with multiple revenue streams, they should be more willing to let the artist retain an increased share of its master recordings. Increased copyright ownership in the artist's masters gives the artist more creative (and legal) freedom to control their catalogue.

• **Consolidation of business affairs** – Depending on the 360 deal, it may allow an artist to consolidate their business affairs with the label, who becomes a one-stop shop for the artist's live performances, general management, publishing, merchandise, endorsements, etc. This could create business efficiencies and ensure there are no overlapping functions among parties who represent the artist. In the contract, take note of the specific aspects of your career that the label is proposing to take control of.

• **The same, but more** – In traditional record contracts, the label would take copyright in the artist's masters, pay out relatively modest royalties (10-13% of net profits), and had options to extend the term of the artist's contract (usually 3 or 4, 1-year options). 360 contracts will generally contain those same provisions, but in addition, the label will seek royalties from all aspects of an artist's career (live performances, merchandise, publishing, endorsements – even movie, commercial, and T.V. gigs!). The question artists have to ask themselves is whether these increased royalties to the label can be justified. Is it simply a money-grab, or will the label actually show increased commitment to the artist. Artists need to also carefully determine whether the label has expertise beyond selling records. For example, it's one thing for the label to have a publishing arm, but does this publishing arm have a track record of making artists money in the publishing world? Does the label know anything about the t-shirt and merchandise world? Is your label the best bet for booking tours and promoting your concerts? If so, great. If not, you may want to try to negotiate the 360 deal into a 270 or 180 deal, so-to-speak.

• **Conflicts of interest** – Beware that with the label wearing so many hats, it's easy for the line to blur between creating efficiencies and creating a breeding ground for conflicts of interest. For example, if the label functions as a label and pseudo manager of the artist, it may owe a fiduciary duty to the artist as manager, but as a label it owes duties to its shareholders (owners). In other words, it might be tough for a label to always have your back as a manager while at the same time trying to maximize shareholder profits. These types of situations should obviously be avoided and addressed at the outset.

• **Negotiate, negotiate, negotiate** – The point here is that you should negotiate. In the legal world, it's rare for a contract of any kind to go from one lawyer to another without at least a few tweaks/changes; however, you and your lawyer's ability to negotiate will depend on your bargaining power and how badly the label wants you. Some labels, for example, may start the negotiating process by wanting anywhere from 5-25% of all artist revenue streams. Can you negotiate a smaller split for the label? Can you retain a larger share of your master recordings? Will your label take a smaller cut of publishing and/or live performance revenue? Can you get away with granting the label fewer options to extend the contract? Are you fine with the label running the full suite of music services, or would you prefer that your dad still handle t-shirt design/sales at your shows? Your ability to negotiate these deal points will depend on your bargaining power as an artist.

## 5. REVENUE STREAMS FROM RECORDS

Part II, section 4 outlines the various revenue streams with respect to music publishing and the exploitation of the musical work copyright. This section briefly touches on the main revenue streams associated with the sound recording copyright.

### *(i) Record Sales*

Artists can make money by selling records either on their own or through a record label. This includes both physical records (CD, vinyl, cassettes) or digital downloads. If the artist signs with a label, their revenue stream will be dependent on (a) how many records the label sells and (b) the royalties payable from the record company, which should be in the 13-16% range of gross sales of the wholesale price of the record (known as PPD – published price to dealers).

### *(ii) Master Use License*

Aside from revenue associated with record sales, master recordings are often licensed for use in T.V., commercials, or film. This could be a significant revenue stream for an artist. If the song is recreated or "covered" for use in T.V. and film, for example, a synchronization and mechanical license will be required to reproduce the musical work (see Part II, section 4(ii) and (iii)). However, if the actual master recording is being used in T.V. or film, a master use license will also be required from the rights holders. As discussed in Part II, the music publisher would typically need to grant rights to the musical work copyright through a mechanical and/or synchronization license, while the record label would typically be required to grant rights to the sound recording copyright through a master use license. Always note that the copyright in the musical work and the copyright in the record are two different things.

### *(iii) Re:Sound*

**Re:Sound** is a Canadian collective rights organization (like SOCAN or CMRRA). While SOCAN pays its member songwriters/publishers for the public performance of their musical works, Re:Sound pays its member record companies and performers (including background musicians) for the public performance *of the record*. These rights are known as "neighbouring rights", and the appropriate tariffs are set by the Copyright Board of Canada. Like SOCAN, you are not required to pay a Re:Sound license fee if you purchase music and use it privately. However, as soon as you use the recording in your dentist office, barbershop, or music venue, the appropriate Re:Sound tariff is required so the performers on the record (as opposed to the songwriters/publishers) receive "equitable remuneration" for their work. This includes royalties for non-interactive streaming services, such as Pandora.

With respect to streaming, Re:Sound even has a reciprocal agreement with U.S. based SoundExchange.[41] SoundExchange collects and pays royalties to its member recording artists and labels for the digital performance of records when streamed via non-interactive digital sources (such as Pandora, SiriusXM and webcasters). Royalties are allocated based on how often a song was played. SoundExchange is a major player, which has distributed more than $4.5 billion in royalties since it began."

### *(iv) CONNECT*

Connect Music Licensing Services Inc. ("**CONNECT**") is an agency that issues licenses on behalf of its member record companies, producers and artists for the reproduction of master sound recordings and music videos. Re:Sound and CONNECT are similar in that both represent rights holders of sound recordings (as opposed to musical compositions). Each, however, represents different rights associated with those sound recordings. While Re:Sound collects revenue on behalf of its members for the *public performance* of sound recordings, CONNECT collects revenue on behalf of its members for the *reproduction* of sound recordings and music videos. If you hire a DJ to perform at your wedding who makes copies of sound recordings by using CD-R, iPod, laptop, USB, etc., you will likely have to pay for a CONNECT license in addition to Re:Sound and SOCAN licenses, all of which represent different rights. Radio stations, retail establishments playing background music, and non-interactive webcasting services may also require a CONNECT license.

## 6. DOWNLOADS AND STREAMING

Record labels will seek to collect revenue from all "electronic transmissions", which includes digital downloads, non-interactive streaming, and on-demand streaming:

- **Digital downloads** – A digital download is essentially an electronic sale of a record, as opposed to the sale of a physical copy. The iTunes Download Store and Amazon are examples of digital download services. Downloads can be both permanent and conditional. For example, a ***permanent download*** is when you buy a record off the iTunes store, which you own in the same way as if you bought it at a record store. You can listen to it anytime you want and even transfer the digital file. Of course, like regular physical records, it's for your own personal, non-commercial use. ***Conditional downloads*** would be downloading a record

[41] SoundExchange announced its acquisition of the Canadian Musical Reproduction rights Agency (CMRRA) on May 15, 2017

for offline use from Apple Music or Spotify. I can listen anytime I want, but would lose access if I stopped paying subscription fees.

- **Non-interactive Streaming** – These music services would allow me to stream music online, but the service provider dictates what I listen to (like traditional radio). Examples of non-interactive streaming include Galaxie Mobile, Slacker Radio, and CBC Music."

- **On-demand Streaming** – Unlike non-interactive webcasting, these music services are interactive streaming services and allow you to listen to any song anytime you want, including the ability to pause and fast-forward. Spotify (if you are a 'premium' member) and Apple Music are examples of on-demand streaming. YouTube is an example of on-demand *video* streaming, which is completely free. YouTube remains an important player in the streaming world as, at the time of writing this *Legal Guide for Musicians,* YouTube offers more audio content than all other streaming websites combined!

While music streaming grows and comprises about 16% of the recorded music income, digital downloading is significantly decreasing.[42] The digital music business is tough, and service providers who offer electronic transmissions of music to the public will pay about 70% of their revenue for rights to the music in their database, which includes both master use rights (from the owner of the master recording) and musical work rights (from the owner of the musical composition).

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[42] *All You Need to Know about the Music Business*, 9th ED, Passman, Donald, 2015 (P. 148)

# PART IV: BUILDING A MUSIC BUSINESS-THE BASICS

## 1. INTRODUCTION

If you want to have a career in the music industry, you need to start thinking about music as your business. If I wanted to start my own restaurant, I would likely sit down with a lawyer and accountant to discuss the most appropriate structure for my business, potential liability issues that may arise, branding and trademark considerations, tax implications, future contracts that I may have to sign and/or draft, employment considerations, etc. These are the same issues you want to sort out with your music business, whether it's as a live performer, session musician, or running a record label. Legal and business considerations will vary on a case-by-case basis. For example, the structure and legal issues faced by a solo artist that only tours the Atlantic Provinces will likely be different than a 5-piece band that tours in the U.S. and Europe; as will the structure between an artist scraping by versus an artist or band that is generating significant revenue. Whether you are a solo performing artist, songwriter, or in a 5-piece band, it is important that you sit down with advisors to discuss the most effective way to carry on business and identify potential legal, tax, and business strategy issues.

## 2. WHAT BUSINESS STRUCTURE SHOULD I USE?

Just like restauranteurs, musicians will need to determine the structure in which to carry on business. Performers, songwriters, labels, etc. could carry on business either as a sole proprietorship, partnership or limited company[43]

### *(i) Sole Proprietorship*

In a ***sole proprietorship***, the individual running the business is the sole owner of the business and their personal status is indistinguishable from that of the business they operate. This means that all of the assets and profits of the business belong to the sole proprietor *in their personal capacity*, as do the liabilities. For example, a solo artist who has never turned their mind to a business structure would be considered a sole proprietor at law.

There are benefits to running a sole proprietorship: start-up costs associated with this structure are low, the sole proprietor retains all profits, and decision making/control rests with the sole proprietor. The main disadvantage with this structure is that the sole proprietor faces *unlimited* personal liability, which means that creditors (i.e. banks or other people/companies that you owe money to) could go after your personal, non-music related assets to satisfy debts that are outstanding (your house and car, for example). Because the individual running the business is indistinguishable from the business itself, the sole proprietor is taxed at their personal marginal rate rather than at a separate (and possibly lower) corporate rate.

### *(ii) Partnership*

A ***partnership*** is the relationship between two or more people, who carry on a business together, with a view to profit.[44] If two or more people, such as band members, carry on business together and share in the profits of the business, chances are the band would be considered a partnership at law (with each band member being an individual partner). Most bands probably do not realize that they carry on business as a legal partnership.

Like the sole proprietorship, start-up costs for the partnership are low (subject to costs for a partnership band agreement, discussed below) and each individual partner is taxed at their personal marginal rate rather than the partnership as a whole. Also like the sole proprietorship, the main disadvantage is that liability is unlimited among the individual partners, and personal assets of the partners could be used to satisfy part-

[43] There are other business structures that can be utilized, such as a Limited Partnership, Limited Liability Partnership, and Unlimited Company. However, the structures discussed in this *Legal Guide for Musicians* are more commonly used in the music biz.

[44] *Partnership Act*. R.S., c. 334, s. 1., Section 4

nership debts. Subject to an agreement to the contrary, partners share equally in all the profits of a partnership and also jointly share all of the liabilities, even if the partnership was sued based on the actions of one partner. If a band finds itself in a partnership, it is highly recommended that the band members (i.e. partners) negotiate and execute a partnership band agreement. Signing this agreement ensures that all band members are on the same page with respect to key issues on a go-forward basis, such as copyrights and royalty split, ownership of equipment/assets, procedure for dealing with a departing bandmate, death of a bandmate, etc.

### *(iii) Limited Company*

Unlike a sole proprietorship and partnership, a ***limited company*** is a legal entity separate and apart from its owners (known as shareholders), directors (responsible for overseeing general management) or officers (responsible for the day-to-day operations). Also unlike the sole proprietorship and partnership, the individual shareholders of a company are generally not liable for the debts and liabilities of the company. In the eyes of the law, the company itself is treated as a separate person. Once a company is incorporated, it is 'the company' that executes contracts and legal documents, not the shareholders or directors of the company (although typically the director(s)/officer(s) with signing authority will sign contracts on behalf of the company).

Liability protection for band members (i.e. shareholders) is certainly one of the more attractive features of the incorporated company (even if the company and its directors obtain liability insurance). Other beneficial features include using share capital to raise money[45], transferability of ownership[46], and potential tax advantages of having a lower corporate income tax rate and using the company to issue dividends to shareholders[47].

On the other hand, incorporating a company is more costly compared to carrying on business as a sole proprietorship or partnership (typically around $1000 - $1500), corporate record keeping can be a pain in the ass, company decisions and corporate actions are subject to legislation[48] (which requires specialized legal advice), and a separate tax filing is required for the corporation itself (remember, it is a separate legal person!). Similar to the partners in a partnership, shareholders of a company should negotiate and execute a shareholders' agreement, which will govern the rights and responsibilities of each shareholder of the company.

You should discuss these structures with legal counsel and an accountant to determine what works best for you or your band. A good rule of thumb is that incorporating a company is probably unnecessary until you start generating decent revenue (i.e. $30,000 or more, which is when you need to obtain an HST number in Nova Scotia – see section 5, below).

## 3. WHAT IS A BAND OR GROUP PARTNERSHIP AGREEMENT?

This is a very important agreement for anyone who plays in a band. If the band carries on business as a partnership, which is most common, the agreement will take the form of a ***Band Partnership Agreement***. If the band carries on business as a limited company, the agreement will take the form of a ***Shareholders' Agreement***. The reality is, most musicians never enter into an agreement of any kind, which will create issues if a dispute arises. Band members can save themselves a lot of headache (and money) by entering into an agreement from the outset.

The major terms you may want to address in the agreement are as follows (assuming a partnership agreement among partners/bandmates):

- Clearly identify the purpose of the partnership, such as recording, songwriting, touring, selling merchandise, etc.

- Determine whether members of the group have brought assets into the partnership, such as gear, cash, tour van, etc. If so, the agreement should clearly set out how this unequal investment in the partnership will play out. For example, the partner who brought significant assets into the partnership may be awarded a higher royalty split, or it may simply be established that the individual partner (and not the partnership) owns the equipment brought in by that partner.

- Determine who is authorized to use the band name if the band breaks up.[49] If the band has one key songwriter, it might make sense to allow him or her to continue using the name if the group disbands. Alternatively, the agreement may dic-

[45] For example, "Dude, if you give me $1,000 towards a new record and equipment, I'll give you 100 shares. I promise they'll be worth something some day!" You must ensure all share issuances are in compliance with securities law.

[46] For example, some or all of the company's shares could be sold down the road.

[47] A dividend is essentially a cash transfer from the company to a shareholder. The dividend will need to be declared as income on the personal tax

[48] See the *Companies Act*, RSNS 1989, c 81 if incorporating a Nova Scotia company and the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44 if incorporating a federal corporation.

[49] Disputes can arise over band names. For example, Mike Love from the Beach Boys acquired sole licensing rights to the 'Beach Boys' name in 1998 and sued Al Jardine and Brian Wilson for unauthorized use. Stone Temple Pilots also sued Scott Weiland for trying to use the band name after getting kicked out of the group (the band name belonged to the partnership pursuant to the STP band agreement).

tate that only the entire group may use the name. Keep in mind that if the partnership is also a party to a recording or publishing contract, the terms contained in those agreements must be considered as well.

- The agreement may outline who owns existing copyrights and copyrights on a go-forward basis (both musical work and sound recording copyrights). The Partnership may want to leave these assets out of the agreement altogether if copyrights have already been assigned to a record company and/or publisher.

- Determine how 'major decisions' will be made, which could be defined to include assigning the band's copyrights, long-term obligations, and expenditures above $1000, for example. Will major decisions be made by majority vote or will all partners need to agree unanimously? The agreement could dictate that day-to-day decisions related to the Partnership be made on a majority basis, while major decisions require unanimity.

- Determine how members will leave or join the band. For example, what happens if (i) a current member leaves the band; (ii) a new member joins; or (iii) a current member dies or suffers a disability rendering them unable to contribute to the band in the same way?

- Determine the circumstances in which the partnership could break up or dissolve. Keep in mind that under Nova Scotia law, unless there is an agreement to the contrary, a partnership automatically dissolves if a partner dies, declares bankruptcy, or becomes insolvent.[50] Also, unless the term of the partnership is set out in an agreement, any partner can dissolve the partnership by notice to the others.[51] Upon any such dissolution, it is important that the partnership agreement set out how partnership property will be dealt with and how existing debts/liabilities will be paid.

The above is not an exhaustive list of things to consider when drafting a band partnership agreement, but is a good start. It is highly recommended that you reach out to legal counsel to discuss and assist with drafting an agreement. Keep in mind that if one lawyer is retained to draft the agreement, each partner should confirm that they have received (or have been given the opportunity and declined) their own independent legal advice prior to signing.

## 4. BRANDING - BUSINESS NAMES, CORPORATE NAMES AND TRADEMARKS

Your business name, band or stage name and any associated logos or designs could potentially be one of your or your band's most valuable assets. For that reason, you should never underestimate the importance and economic value of the brand you are creating as an artist.

In my experience, there is often a lot of confusion surrounding the differences between business names, corporate names and trademarks. This is the case with all businesses, not just businesses in the music industry. The following is a summary of each:

### *Business and Corporate Names:*

If I were to carry on business as a sole proprietor or partnership (see section 2, above) using a name other than my own personal name, I would need to register a **business name** with the Nova Scotia Registry of Joint Stock Companies . For example, if I operate a shoe store and want to call the store "Gorman's Shoes & More", I would need to register that business name. The purpose of registration is to ensure business names are not confusingly similar to other business or company names in the marketplace. I would not need to register anything if I decide to carry on business as "Matthew C. Gorman", but all bank accounts, contracts, and any other documentation must reflect my personal name only. Each province has its own set of laws regarding registration of business names. At the time of writing this *Legal Guide for Musicians*, the Nova Scotia Registry of Joint Stock Companies does not generally register band names. However, if you are operating a record label, publishing business, recording studio, or any other music service business, the general rule applies and your business name must be registered if it's different from your personal name.

If you decide to carry on business as an incorporated company, your **corporate name** must first be approved by the Registry of Joint Stock Companies. Similar to the business name, a search must be done to ensure it is not identical or confusingly similar to another company name or business name in the marketplace. Once incorporated, the company must sign documents, open bank accounts, and transact day-to-day business under the corporate name, not under the name of the individual shareholders or directors. An incorporated company can carry on business using a name different than its incorporated name provided the company registers the new business name. For example, my company, Gorman Publishing Services Limited, may only carry on business as "Gorman Pub Co." or "MG Publishing" if the company successfully registers those additional business names. Otherwise, it must only do business and sign contracts under the registered corporate name, 'Gorman Publishing Services Limited.'

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[50] *Partnership Act*. R.S., c. 334, s. 1. Section 36

[51] *Partnership Act*. R.S., c. 334, s. 1., Section 35(c)

*Trademarks:*

***Trademarks*** are something different from business and corporate names. They are words, designs, sounds or a combination that distinguish goods and services in the marketplace. Trademarks have the potential to become very valuable intellectual property. Consider the cash generated in merchandise from the following trademarks:


**THE TRAGICALLY HIP**


A trademark could consist of purely a design, like the iconic Rush and Rolling Stones logos. It could be a simple wordmark with no design, like "The Tragically Hip". It could also be a combination of words and design, like the iconic Nirvana happy face and Pink Floyd font. A business name or corporate name, discussed above, could also be registered as a wordmark if you use the mark to identify your goods or services. For example, my registered business name "Gorman Pub Co." could only be registered as a trademark if I was using that exact name in connection with my publishing services.

One thing to note is that if you hire a graphic designer to design a trademark for your band, you should ensure that the copyright is assigned from the designer to the band (and moral rights are waived). This is because, as noted in Part 1, the author of a work is the first owner of the copyright. Copyright assignments need to be in writing and signed by the owner, which would be the graphic designer, their company or both.

Unlike the registration of copyrights (discussed in Part 1, section 2), which is often believed to be unnecessary, registration of a trademark with the Canadian Intellectual Property Office is highly recommended. By registering with CIPO, your trademark is given national protection for 15 years, which can be renewed for another 15 years. By virtue of registering a trademark, it is evidence that the trademark is yours, and any challenger would have to disprove that the mark is yours, rather than you having to prove that the mark is yours. Trademarks is a very specific and intricate area of the law, so you will need to sit down with a lawyer or trademark agent to determine whether your proposed mark is "registrable".[52] You can start the process by conducting as many online searches as possible to ensure your proposed name is not already being used by another act. In some notable examples, "Pezz" had to change its name to "Billy Talent" and the British band "Bush" had to change its name to "Bush X" when touring in Canada, both due to trademark issues. Keep in mind that trademarks are registered on a country to country basis, so if you plan to tour internationally, you should ideally arrange registrations in each country in which you plan to tour. So long as no problems arise during the registration process, it will cost you approximately $1000 - $1500 a pop.

Although registering a trademark is highly recommended for the above reasons, you can still obtain a trademark even if you don't register with CIPO. An artist or band can establish that they have ***common law trademark rights***, which is a fancy way of saying that the artist may have a trademark without registering with CIPO by simply *using* the trademark in the marketplace. For example, if my band name is not registered with CIPO but we are playing lots of shows, selling posters, CDs/vinyl, stickers, bottle openers, getting radio play, etc., our band name may automatically attract trademark status. The more you promote your brand in the marketplace, the stronger your common law trademark protection becomes. One catch is that, while registering your trademark with CIPO provides automatic *national* protection, common law trademark rights may only afford you with protection in the specific geographical area in which you do business (i.e. where your band regularly plays, locations in which you have regular radio play, etc.). Therefore, it is possible for two bands with common law trademarks to perform under the same name if one band is based in Halifax and the other in Vancouver. Given the fact that social media, on-demand streaming and webcasting have made music instantaneously accessible to virtually everyone

[52] For example, the mark cannot be confusingly similar to another trademark and it cannot simply be a surname (e.g. 'Gorman').

around the world, the line is blurry as to how far an artist's geographical reach might be when their trademark is based solely on common law rights, but this is still the law. If you are serious about your music and you have the budget, trademark registration is highly recommended.

Whether you decide to formally register your trademark or not, never underestimate the importance and value of your band name and overall brand, and the potential consequences of having to rebrand if you don't do your due diligence from the outset.

## 5. TAX BASICS

Tax is a very specialized area, so an ***entertainment accountant*** should be a member of your musical team. A good accountant, in conjunction with a lawyer, will assist with structuring your business in the most tax effective way and ensure your tax filings are on time and correct.

Musicians should be aware of the fact that all *world-wide* income must be reported on your Canadian income tax filing, which includes royalties earned from exploiting copyrights, records sold both in Canada and abroad, digital downloads, live performances both in Canada and abroad, merchandise sales, etc.. Any type of grant or prize money should also be claimed as income, but only in the year that you actually spend it. With respect to performances in the U.S., ensure you seek accounting advice before you tour south of the border as you will want to get a handle on the correct tax ID numbers required to accurately report income earned in the U.S. Unless certain exemptions apply, keep in mind that withholding tax will typically apply to income earned in the U.S., which means that up to 30% of money earned from shows may be withheld from the performer for a certain period of time. Speak to your immigration lawyer or accountant about whether you are eligible for withholding tax exemptions.

In addition to income tax, you may be required to register for and collect GST/HST on certain transactions. Ticket, album, and merchandise sales are all subject to GST/HST, as are fees that you receive for performing. If your gross sales of goods and services are more than $30,000 in any given year, you likely have to register for a GST/HST number and collect the tax from your customers. Notably, though, music lessons are exempt from GST/HST, so you don't need to collect tax on any fees you receive from providing lessons.

The vast majority of musicians are self-employed, so it is important to understand what you can and cannot claim as a business expense. As a performing artist or songwriter, so long as you are carrying on your business with a "reasonable expectation" that you will profit from music, you may be able to deduct several expenses as business expenses for the purposes of your income tax filing. These are reasonable expenses you incur while earning income from music, which may include:

- Insurance premiums on musical instruments and equipment;
- Instrument and equipment maintenance and repairs;
- Depreciation (i.e. wear and tear) on instruments, recording equipment, and office equipment;
- Interest expense on loans taken out to purchase business equipment;
- The cost of leasing or renting equipment;
- Legal and accounting fees;
- Union dues and professional membership dues;
- Agent and management commissions;
- Remuneration paid to a substitute or assistant;
- Publicity and marketing expenses;
- Travel expenses related to work, both in and out of town;
- The cost of recording demos or masters;
- Cell phone expenses;
- General office expenses;
- The costs to maintain the portion of your residence used for professional purposes;
- Studio rentals; and
- Professional development.[53]

As noted in the discussion on business structures, one benefit of conducting business as an incorporated company is flexible corporate tax planning options. For example, incorporated companies may be able to claim the small business deduction on active business income earned in Canada. So long as the company is a "Canadian-controlled private corporation" and meets the criteria set out in the *Income Tax Act*, the small business deduction applies an 11% federal tax rate on incomes below $500,000. Remember that as a sole proprietorship and partnership, the sole proprietor/partners are taxed at their personal marginal rate, which could be quite higher than 11%. You may also be able to set up a structure whereby all cash earned goes to your company, which then issues dividends to its shareholders (i.e. owners). The company may be taxed at a lower corporate rate on all income it receives, and the shareholder would only be

[53] See Tax Tips for Canadian Songwriters, Lorne Sprackman, March 10, 2014 (https://www.socan-magazine.ca/sound-advice/tax-tips-for-canadian-songwriters/)

taxed on the dividends it receives from the company.

This is complicated stuff, so you are encouraged to sit down with an entertainment accountant or tax lawyer to review tax planning options that suit your individual needs as an artist. No matter what, always maintain accurate records, hold onto receipts, keep track of your business deductions, and complete all income tax filings on time.

## 6. MANAGERS AND ARTIST MANAGEMENT CONTRACTS

If you are going to build a business in the music industry, an essential person to have on your team is a ***manager***. An artist may have a hot-shot manager from a reputable Halifax, Toronto, or Vancouver management firm, or the artist's manager may simply be one of their friends who started driving the tour van. Either way, the manager is generally viewed as someone who helps the artist further all aspects of their career, including securing/negotiating contracts (with the lawyer's assistance), providing general counseling on music-related matters, providing creative advice/guidance, assisting the artist with building a 'team' comprising of a lawyer, accountant, publicist, etc. Managers of this kind (generally referred to as 'personal managers') should be distinguished from ***business managers***, who assist the artist with managing their cash-flow and assets, and provide general business advisory services such as banking, tax, and investment strategy. When starting out, the personal manager and business manager might be the same person; however, once cash-flow is decent, ensure your business manager is a skilled professional that knows how to manage your money and make it grow over time.

Although managers and artists often work together based on a 'hand-shake deal', it is highly recommended that the artist and manager enter into a contract, which binds the parties to certain obligations and clarifies their rights and responsibilities. The following is a non-exclusive list of contract terms you may want to think about before signing:

- **Will they bust their ass for you?** – The first thing all artists should consider is whether their manager is going to work for them and further their career. Securing a hot-shot manager doesn't mean much if he/she ignores you and is preoccupied with other clients. The artist could try to work a 'trial period' into the contract to ensure the manager is a good fit before rushing off to get married. Such a provision should allow either party to get out of the contract after, for example, 6 months, no questions asked.

- **Exclusivity** – An artist is typically expected to be exclusive to the manager, but the manager is not typically exclusive to the artist. In other words, artists will not be able to retain another manager after signing the contract, but managers could (and likely will) manage multiple artists. You need to get used to the fact that you are getting married to an unfaithful spouse.

- **Manager compensation** – Managers will typically get a share of artist's gross income (usually not net), and 10-25% is standard. How this share is calculated is very important. For example, the contract may exclude from the manager's share monies that flow through the artist, such as record costs, video costs, tour support, etc. The rationale is that these are necessary expenses that reduce artist's income, so they should be deducted from the pot prior to manager's 10-25% being calculated. The contract should also set out how long commissions are paid to the manager, which could be forever for revenue streams associated with contracts that the manager secured. If the artist/manager relationship is terminated, it's common to see a ***sunset clause***, which means that commissions to the manager decrease over 3-5 years until the commission is 0%.

- **Term** – The contract should clearly set out how long the contract lasts, which is typically 5, 1-year periods with the manager given the right to exercise renewal options. The artist might want to add performance objectives associated with each term. For example, the artist may try to prevent manager from exercising an option unless artist earns $X annually, secures a record deal, secures publishing a contract, etc.

- **Duties of manager** – This might seem like an obvious one, but the exact duties of the manager should be set out in the contract. These may often be very broad-based, such as "manager shall assist with all aspects of the Artist's career"; however, setting out the specific duties is preferable.

- **Artist payment** – How often is artist paid by manager? Ideally it's every 30 days, but no more than every 90 days. Keep in mind that if the manager loans the artist money, those loans would generally get paid back to manager as soon as money comes in (but after manager takes out his/her management commission).

• **Power of Attorney** - Manager may often be able to sign contracts on behalf of the artist if the contract grants them POA. If you grant POA to your manager, you probably want to grant a ***limited power of attorney***, which limits authority to specified activities rather than a general POA, which would allow the manager to do anything under the sun. A limited POA could include things like cashing incoming payments, signing live performance contracts, approving expenses below a certain dollar amount, etc. These limited rights should be specifically set out in the contract. You should be consulted for everything else, such as signing a long-term contract, decisions/contracts pertaining to artist's name or likeness, incurring expenses beyond a certain dollar amount, etc. Get your lawyer to ensure the POA granted to your manager won't conflict with any POA granted to others for estate planning purposes.

• **Key person clause** – You may have developed a personal relationship with your manager during the 'getting to know you phase'. Keep in mind that you may not get along with other managers who work for the management company you are signing with. As such, you might want the right to terminate the contract if your manager leaves the management company you contracted with. The management company may not budge on this one unless the artist has significant bargaining power.

• **Management expenses** - Managers will often seek reimbursement of expenses during the course of their management duties. The artist should ensure the manager doesn't spend indiscriminately and that expenses are (1) "reasonable"; and (2) within a certain dollar threshold. Anything above that threshold should require the artist's approval.

• **Assignment of Contract** – Both manager and artist are typically limited in their ability to assign the management contract. Artists are likely not allowed to assign unless it's to a company (owned by the artist) for tax purposes. If the manager is given the right to assign, you may want to restrict manager's right to assign the contract to another company that manager joins. Ideally, artist would have the right to terminate the contract if it wasn't satisfied with the assignment.

## 7. ENTERTAINMENT LAWYERS

Aside from a manager, an essential person to have on your music team is an entertainment lawyer. Saying that any lawyer is suited to be your entertainment lawyer is like saying that a linebacker is suited to be a quarterback simply because he/she is a football player. The linebacker may know a thing or two about throwing the football, but is likely not the person you want to make the clutch pass in the final moments of the game.

As previously stated, your manager will try to further all aspects of your career by lining up deals with publishers and labels, provide input on producers and sound engineers, work with your booking agent to ensure you have successful tours, and generally 'makes things happen' for the artist. The entertainment lawyer will provide legal advice on all aspects of your career.

Anytime a recording contract, publishing deal, or live performance agreement, for example, are being negotiated, your lawyer should review those contracts, advise on the risks, and provide a suggested redraft before you sign (your ability to redraft a contract will always depend on your bargaining power). Aside from reviewing contracts, your entertainment lawyer will also assist during the initial stages of your career with respect to incorporation, shareholders'/partnership agreements with bandmates, advice on liability or 'risk exposure' during shows, etc. Lastly, your entertainment lawyer will provide you with advice when things go wrong. For example, if you are getting sued by a promoter, injured fan, or fellow musician who says they want a bigger slice of the pie, your entertainment lawyer will work through the issues with you (subject to conflicts of interest) and attempt to resolve the matter. Conversely, if you are looking to sue a disgruntled ex-bandmate for stealing your music, promoter or venue owner who stiffed you, or a manager that doesn't seem to be distributing royalties as per your artist management agreement, you should pick up the phone and book a meeting with your lawyer to discuss.

Some lawyers may take a commission on revenues. In Nova Scotia and other Canadian provinces, it is more common for your entertainment lawyer to bill you at an hourly rate for the specific services they are providing. A commission may be appropriate if your lawyer, for example, either acts as your manager or performs management type services. Before you proceed with your lawyer, clarify, in writing, (1) exactly what services you need and exactly what your lawyer will be doing; and (2) fees/commissions payable for the services the lawyer will be providing, including applicable disbursements.[54] If they don't provide you with a retainer letter, ask your lawyer for a retainer letter setting out all this information. Depending on the services being provided, your lawyer should give you a ball-park quote for the cost of their services. Your lawyer might even be willing to provide a

'fixed fee' for services, meaning you will know exactly, at the outset, how much legal fees will run you (instead of being billed at an hourly rate). Use of a fixed-fee billing structure is increasingly becoming the norm for legal services in Canada and the U.S.

[54] Disbursements are non-legal fees that lawyers/law firms will typically pay on your behalf, but pass off to you in your invoice. Disbursements could include, for example, things like copying/printing, standard incorporation fees that are charged by the province, or trademark filing fees charged by CIPO.

# PART V: LEGAL CONSIDERATIONS FOR LIVE PERFORMANCES AND TOURS

## 1. LIVE PERFORMANCE COPYRIGHT

With traditional record sales declining, more and more artists/performers are relying on cash flow from live performances as their dominant revenue stream. As noted in Part 1, the owner of a copyright has the sole right to perform a work or any substantial part in public.[55] This means that a performer can prevent others from performing his/her work in public unless appropriate SOCAN licenses are in place. Furthermore, a performer has a copyright in their ***performance*** (i.e. live or recorded performance), which consists of the sole right to record the performance and communicate it to the public.[56] This means that a performer has the right to prevent others from recording their live performance and broadcasting the performance without permission, which becomes a relevant deal point when negotiating a Live Performance Agreement with a promoter (discussed further in section 5, below). Next time you are playing a show and someone tries to record it without your permission, wag your finger and tell them to stop unless they pony up.

## 2. BOOKING AGENTS, MANAGERS, LAWYERS, AND PROMOTER

There are a number of people who may be involved with respect to your life on the road. The most important are probably your booking agent, manager, entertainment lawyer, and the promoter for individual gigs. Your status as a performer (e.g. super-star, just trying to get by, or something in between) will likely dictate whether you have a separate booking agent (possibly associated with your label) or whether your personal manager is doing most of the negotiating and hustling while you are on the road. Nonetheless, it is important to know a little bit about these roles:

- **Booking agent** – Their role is primarily to assist the artist with booking shows, arranging appearances (radio shows, T.V., possibly movies), negotiating contracts (with the assistance of the artist's lawyer), and providing advice with respect to the artist's life on the road. If you have a personal manager, you may not see your booking agent often (maybe at certain concerts/festivals or before a tour). It's a good idea to have your manager assist with selecting a booking agent, who will likely be dealing with your manager more than you anyway. Agents may receive 5-10% of live performance revenue, and generally don't receive cash from other revenue streams such as record sales and/or publishing. In addition to live performance revenue, some agents may try to collect commissions on things like appearances on T.V. shows, commercials, movies, or soundtracks. As always, everything is negotiable, but will depend on your bargaining power as a performer.

- **Personal managers** – The role of personal manager is discussed in detail in Part IV, section 6. Managers are mentioned in this section because personal managers often negotiate live contracts and assist artists on the road. If so, the manager often becomes the de facto booking agent. Managers typically collect a commission on the artist's entire earnings, which include earnings from live performances.

- **Entertainment lawyer** – The role of entertainment lawyer is discussed in Part IV, section 7. Entertainment lawyers are mentioned in this section as, like managers, your entertainment lawyer will provide legal advice with all aspects of your career, including live performances and life on the road (contracts, liability, immigration, etc.). Irrespective of

[55] Ibid, section 3(1)

[56] Section 15(1), *Copyright Act*, RSC 1985, c C-42

whether your manager or booking agent negotiates live performance contracts on your behalf, all contracts should be reviewed and vetted by your entertainment lawyer to ensure every paragraph, sentence, and word is appropriate. If something doesn't look quite right, your entertainment lawyer will provide advice on the prickly bits of the contract so you are in a position to assess the potential risks before signing.

• **Promoter** – Not every show you play is going to have a promoter, but bigger shows may. Simply put, the promoter is responsible for promoting the show and ensuring people show up *en masse*. The promoter will likely deal with your booking agent or manager, and should be responsible for all aspects of the live event such as security, insurance, appropriate licenses, etc. The promoter will contract with the musician for the musician's services (discussed below in section 4). Depending on the show, the promoter may also contract with the owner of the venue. That contract (likely a license), would outline how long the promoter requires the space, terms concerning use of the space, and liability should someone at the show get injured, for example. Your contract with the promotor should, in most cases, be limited to providing your musical services, and you should proceed with caution before signing anything with the venue owner, which is normally the promotor's responsibility.

## 3. SOCAN AND LIVE PERFORMANCES

As discussed in Part II, SOCAN assists its member songwriters and publishers with collecting and distributing royalties on behalf of its members for the public performance of musical works. In addition to distributing royalties to its members when musical works are played on the radio, commercial establishments, TV, movies, etc., SOCAN will also assist songwriters with getting paid when their songs are performed live. For some artists, this might be the first time they see publishing revenue come in. In order to get paid for the live performance of your musical compositions, the catch is that the musical work must be performed at a concert where live music is the focal point of the event, such as music festival, bar gig, or even a house concert.

In order to get paid by SOCAN when your musical work is performed at a concert, SOCAN will need to ensure (1) the venue has paid a SOCAN license fee; and (2) there is a minimum $6.00 cover. The first requirement makes a lot of sense: since royalties from the performance of musical compositions are coming from the payment of SOCAN license fees, those SOCAN license fees need to be paid for royalties to flow. Bars/clubs that regularly host shows have likely paid the appropriate tariff, but it's something the artist should know beforehand. The second requirement illustrates that music is the focal point of the event, which is assumed if people are paying $6.00 or more at the door.

To ensure you get paid for the live performance of your musical composition, you should maintain as much documentation as possible with respect to the concert, which includes ticket stubs, concert posters, emails from the promoter, etc. This documentation is required to prove that the event actually took place and that SOCAN isn't dishing out royalties for nothing. The performer will need to fill out a Notification of Live Music Performance within 1 year of the performance.

## 4. LIVE PERFORMANCE CONTRACTS

If you are lucky enough to play shows big enough to necessitate a Live Performance Contract, it's important to understand the terms of the contract and legal issues at play. These contracts would typically be between the artist and the promoter of the concert. The promoter would also have a separate contract with the owner of the venue for use of the space. The artist should only sign contracts that are applicable to the artist. For example, the artist should normally not be required to sign the contract for use of the venue, which is typically between the venue owner and promoter.

The following is a non-exclusive list of some terms/conditions that the artist will want to confirm in the Live Performance Contract:

• **Payment** – Most importantly, what are the payment terms of the contract? Is it a lump-sum payment, based on ticket sales, or both? You will also want to determine when you are getting paid. Are you getting everything at once before the show, or 50% before the show and 50% after? Both would be reasonable. Furthermore, if payment is based on ticket sales (exclusively or in addition to a guarantee), pay careful attention to whether your cut is based on "net" or "gross" receipts. Net receipts means that the promoter puts all their cash on a table, deducts expenses like sound, security, door guy, etc., and then pays your share out of that smaller cash-pool. If you are agreeing to a percentage of "net" receipts (anywhere from 70/30 to 90/10 in the musicians favor), you should also have a guaranteed minimum to ensure you don't take a haircut if expenses get out of control.

• **Copyright Considerations** – As previously discussed, the owner of a copyright has the sole right to perform that work in public. Further, a performer owns the copyright in their performance,

which prevents others from recording that performance and distributing it without the performer's consent. Consider whether you want to give the promoter the right to record and distribute the performance.

• **Limit of Liability/Indemnity** – These provisions can tend to be confusing in all contracts. Ideally, the "limit of liability" provision would state that, should the promoter be sued for its own acts, omissions, negligence, etc., the artist will not be responsible. It should also indicate that, even if the artist is sued by someone other than the promotor for the acts, omissions and negligence of the promotor, the promoter will "indemnify" (reimburse) the artist, which includes all of the artist's out of pocket expenses (even legal fees).

• **The Performance** – The artist should ensure that provisions relating to the performance itself are included in the contract, such as: (1) the venue; (2) time of the performance; (3) the required length of artist's set; (4) opening act and who can choose it; etc.

• **Insurance** – it is essential that both the artist and promoter be adequately insured prior to a gig, which would include personal injury, cancellation, and equipment. Artists should speak to an insurance provider to ensure they are adequately covered at all times in case someone, for example, gets injured at a concert and sues the artist. The limit on liability provision in the contract, however, should protect the artist if the injury was the promoter's fault.

The above list just scratches the surface with respect to relevant terms in a Live Performance Contract. There will usually be other provisions known as "rider" provisions, which will likely be attached to the Live Performance Contract as a schedule or appendix. So long as the Live Performance Contract is drafted appropriately, the artist rider forms part of the contract and is just as enforceable as any other term. The rider is where artists might try to get away with outrageous demands like an empty hotel room so they can fill the vacant space with custom furniture (*cough*…Madonna), full-size snooker table (The Stones), or the systematic removal of all brown M&Ms (Van Halen). Some more common artist rider provisions could include the following:

- Adequate security at the event;
- Sound and lighting specifications;
- Sound check requirements;
- Cancellation by artist, which might include an illness, low ticket sales, or the promoter failing to meet material obligations;
- Choice of opening act;
- Benefits or perks (as discussed above), which would cover the request for a bathtub of golden teddy bears, assortment of vegan food, or baby-proofed rooms;
- No recordings, photographs, or videos are to be made of the performance; and/or
- Artist input on advertising, promotion and press associated with the performance.[57]

## 5. TOURING IN THE UNITED STATES

If you are planning to tour in the U.S., it is essential that you contact your lawyer (who should be well versed in immigration law) or the American Federation of Musicians (see below) to determine whether you require a temporary work visa. For Canadian musicians, the visa you need to secure is likely a 'P' or 'O' visa. If you don't acquire the appropriate visa before you tour the U.S., it's possible you will be (a) kicked out of the country (quickly), (b) fined; (c) barred from entering the U.S. for up to 5 years; or (d) all of the above.

If you are looking to legally enter the United States to work as a touring musician, the majority of artists will obtain a ***P-2 classification visa***, which is available to well-known or emerging artists. To get a P-2 visa you should become a member of the American Federation of Musicians (AFM), who will be able to petition on your behalf. The AFM will provide the same service as an immigration lawyer. P-2 visas will generally be good for up to 1 year; however, your application must outline your tour dates in advance, which cannot be spaced apart by more than 28 days (you cannot add more tour dates after applying!). So long as you have negotiated contracts to play at least every 28 days in the U.S., you extract the full 1-year benefit of the visa and avoid the need to "re-apply, re-pay, and re-wait"[58] for another visa. The visa application will cost you $325 US, plus an admin fee of $100. The admin fee increases by $20.00 per musician you add to the application. For further information, check out the AFM website, which includes the required P-2 application documents.

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[57] See, generally, Musicians and the Law in Canada, Sanderson, Paul 4th ED, 2014 (pages 251-261)

[58] I stole these words from Ben Caplan. Thanks, Ben!

## 6. ENFORCING YOUR RIGHTS

No one likes getting stiffed, particularly hard working musicians who may not be making tons of cash early in their career. For touring musicians, if a venue owner/promoter does not pay what was agreed upon, you have a right to initiate legal action against them for breach of contract (even if no formal live performance contract has been excited).

Suppose the owner of venue X wants to book your band. The agreement is that your band will close the show, play for 1 hour, and you will get paid a guaranteed minimum of $2500 plus a percentage of ticket sales. You agree to collect your money after the show. After the show, however, the venue owner is nowhere to be found. You email and call him, but no response. You continue to follow up over the next week, but radio silence. What do you do? So long as you can establish that you had a contract with the venue owner, your prospect of success is probably pretty reasonable. In essence, you need three things to establish that a contract existed: (1) an offer, (2) acceptance of the offer, and (3) consideration. In this hypothetical, the venue owner offers the artist a gig at his venue for cash (check). The artist accepts the venue owner's offer at the price stated (check). Consideration is the benefit that is transferred to the venue owner (promisor), or the detriment or loss suffered by the artist/band (promisee). In this case, the venue owner has received the benefit of your musical services (check). In addition, the band suffered a detriment by spending time, money (expenses) and exerted effort in performing the show (double check). The threshold for establishing consideration is quite low under Canadian law, which is why you might see a party agree to pay $1.00 under a contract as "good and valuable consideration".

If you can establish that a contract existed, the next step would normally be to write the venue owner (either by email or letter), indicating that you are owed money and are demanding that they pay up. This is known as a "demand letter", and could be written either by you or a lawyer. If still nothing, you can commence an action in the Small Claims Court of Nova Scotia if the claim is under $25,000. Small Claims is a relatively quick way to resolve your dispute (usually a few hours in the evening). Although you can retain a lawyer for Small Claims Court, the process is designed to be more informal and the laws of evidence are somewhat relaxed. Therefore, many claimants represent themselves at Small Claims Court. You will need to attend your local courthouse and pick up the appropriate claim form, which will be served on the other party with a specified court date.

Getting involved in legal proceedings is generally never a pleasant experience. It can eat up a lot of the artist's time and money, which often dissuades artists from pursuing legal action in the first place. It is important, however, that you understand what options are available should you decide to enforce your rights. If you believe your rights have been violated, it never hurts to discuss the situation with a lawyer and determine whether a legal claim is worth pursuing, either with the assistance of a lawyer or as a self-represented litigant."